Filed 10/7/04 Los Angeles SPCA v. Rogers CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LOS ANGELES SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, Plaintiff and Respondent. v. GARY M. ROGERS, Defendant and Appellant,	B170192 x-ref. B152256 c/w B154410 (Super. Ct. No. BC 216821)

APPEAL from an order of the Superior Court of Los Angeles County. Dan Thomas Oki, Judge. Affirmed.

Webb & Carey and Patrick D. Webb and Kevin A. Carey for Defendant and Appellant.

Jones & Lester, James G. Jones for Plaintiff and Respondent.

In the third appeal in this case, defendant Gary M. Rogers appeals from a post judgment order denying his request for contractual attorney fees. We affirm.

BACKGROUND

In March 1999, Rogers, as seller, and Northern Trust Bank of California, N.A. as buyer (buyer is the predecessor in interest of plaintiff The Los Angeles Society for the Prevention of Cruelty of Animals, hereinafter "LASPCA" or "SPCA") entered into a Purchase Agreement for commercial real property in Hawthorne. The total purchase price of $280,000 included an initial deposit of $7,000, which buyer deposited into escrow. The purchase agreement contained a $7,000 liquidated damages clause in the event of a breach by buyer.

After buyer assigned its rights to SPCA, the escrow failed to close and each party accused the other of breaching the Purchase Agreement. SPCA sued Rogers for specific performance and breach of contract in September 1999. Rogers cross-complained for breach of contract.

The trial court granted SPCA's motion for summary judgment and entered summary judgment granting specific performance of the Purchase Agreement. The court awarded SPCA $40,000 in attorney fees pursuant to the Purchase Agreement's attorney fee clause.[1]

Rogers appealed from the summary judgment for specific performance (*Rogers v. Los Angeles Society for the Prevention of Cruelty to Animals* (B143465), "*Rogers I"*), but the appeal was dismissed pursuant to stipulation of the parties on November 16, 2000,

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[1] Paragraph 16 of the Purchase Agreement provides: "If any Party or Broker brings an action or proceeding (including arbitration) involving the Property, to enforce the terms hereof, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. Such fees may be awarded in the same suit or recovered in a separate suit, whether or not such action or proceeding is pursued to decision or judgment. The term 'Prevailing Party' shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense. The attorneys' fees award shall not be computed in accordance with any court fee schedule, but shall be such as to fully reimburse all attorneys' fees reasonably incurred."

following a voluntary mediation. According to the Settlement Agreement, the sale was to be completed at the original price of $280,000, but Rogers was to pay only half ($20,000) of the ($40,000) attorney fees awarded to SPCA in the judgment. SPCA was to deposit the balance of $273,000 into escrow no later than three business days before the closing date. SPCA agreed not to enforce the summary judgment for specific performance, "provided that Rogers fully performs under this Settlement Agreement. In the event that Rogers is in breach or default under the terms of this Settlement Agreement, then LASPCA shall be entitled to enforce the Judgment, including, without limitation the award of attorneys' fees and costs, by utilizing the continuing jurisdiction of the Court as provided in paragraph 9 of said Judgment . . . . In addition, the parties agree that if Rogers is in default of this Settlement Agreement, then in addition to all other remedies available to LASPCA hereunder, LASPCA will be entitled to all of its attorney's fees and costs subsequent to the date of the Judgment; i.e., June 21, 2000."

As permitted by the Settlement Agreement, Rogers gave notice that he was advancing the escrow closing date from Wednesday, April 11, 2001, to Tuesday, April 10, 2001. This meant that Rogers was to vacate the property by Monday, April 9, 2001 (one business day before the closing date) and SPCA was to deposit the funds in escrow by Thursday, April 5, 2001 (three business days before the closing date).

SPCA, however, did not deposit the funds until Friday, April 6, 2001, which was one day late.

On the April 10 closing date, Rogers refused to close escrow. SPCA, alleging that Rogers had breached the Settlement Agreement, moved to enforce the summary judgment for specific enforcement of the Purchase Agreement, and also sought attorney fees. Rogers, alleging that SPCA had breached the Settlement Agreement, moved under paragraph 14 of the Settlement Agreement to vacate the summary judgment and dismiss the action with prejudice.

Paragraph 14 of the Settlement Agreement states: "14. Vacating Judgment Upon Breach by LASPCA: In the event and only in the event that LASPCA fails to deposit the

sum of $273,000 as required by the terms and conditions of this Settlement Agreement, then said failure shall constitute a material breach of this Settlement Agreement and a material breach of the Purchase Agreement on the part of LASPCA. In such event, LASPCA shall not be entitled to any further notice or demand and the Purchase Agreement and Escrow shall be automatically canceled and terminated without liability on the part of one party to the other. LASPCA shall have no right under this Settlement Agreement or the Purchase Agreement to cure said breach. In such event, the parties agree that upon noticed motion by Rogers to the Court with appropriate notice to LASPCA, the Judgment shall be vacated and the Action dismissed with prejudice. In the event that Rogers is not in default of this Settlement Agreement, then LASPCA shall not oppose said motion."

The trial court (the Hon. Madeleine I. Flier) granted SPCA's motion to enforce the summary judgment for specific performance, and denied Rogers' competing motion to vacate the summary judgment.

Rogers then filed two appeals, which we consolidated (*Los Angeles Society for the Prevention of Cruelty to Animals v. Rogers* (B152256 c/w B154410, Nov. 20, 2002) [nonpub. opn.], "*Rogers II"*). In *Rogers II,* we refused to address issues raised by Rogers concerning the correctness of the summary judgment, finding he had waived the right to seek review of those issues by voluntarily dismissing *Rogers I,* which involved identical issues. We stated in *Rogers II*, "Here, Rogers' appeal from the denial of his motion to vacate raises the same issues as did his earlier appeal, which he dismissed with prejudice. Because of this ruling, we will not discuss the facts or correctness of the underlying summary judgment."

In *Rogers II,* however*,* we did address Rogers' remaining contention that the trial court had erred in granting SPCA's motion to enforce the summary judgment. We concluded in *Rogers II* that SPCA's failure to deposit the funds on time constituted a non-curable material breach under paragraph 14 of the Settlement Agreement. We remanded for the trial court to prepare a new order vacating the summary judgment and

dismissing the action with prejudice, pursuant to paragraph 14 of the Settlement Agreement. Our remittitur in *Rogers II* issued on January 23, 2003.

On March 18, 2003, the trial court (the Hon. Owen Lee Kwong) issued an order vacating the summary judgment and dismissing the action with prejudice. On April 18, 2003, Rogers served SPCA with notice of the March 18 order.

On June 17, 2003, Rogers filed a post-judgment motion for contractual attorney fees as the prevailing party under Code of Civil Procedure section 1717.[2] Rogers sought fees under the attorney fees clause contained in the original Purchase Agreement, which provided for the award of fees to the prevailing party. Rogers' position was that SPCA's material breach of the Settlement Agreement was, according to paragraph 14, also a material breach of the Purchase Agreement. The order of dismissal entered on March 18, 2003, was, according to Rogers, a judgment in Rogers' favor that made him the prevailing party as to the entire action. Rogers' stated that, "As a result of LASPCA'[s] breach of the settlement agreement and Purchase Contract, and the dismissal of LASPCA's action with prejudice, Rogers is entitled to his attorneys' fees." Rogers sought attorney fees of $122,008.75, based upon 549.55 hours of legal services incurred in the trial court and in the several appeals.

In opposition to Rogers' fee request, SPCA argued that Rogers was not entitled to fees incurred in *Rogers I* because: (a) Rogers was not the prevailing party in *Rogers I* because he dismissed the appeal with prejudice (citing Civ. Code, § 1717, subd. (b)(2) ["Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section"]; (b) Rogers waived his right to attorney fees under paragraph 14 of the Settlement Agreement, which states that "each party shall bear its own attorneys' fees and costs in connection with the

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2 "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. . . ." (Code Civ. Proc., § 1717, subd. (a).)

Complaint, the Cross-Complaint, the Purchase Agreement, the Judgment, the Appeal, and this Settlement Agreement"; and (c) paragraph 14 of the Settlement Agreement states that upon SPCA's material breach, "the Purchase Agreement and Escrow shall be automatically canceled and terminated without liability on the part of one party to the other."

SPCA also argued that Rogers is not entitled to fees incurred in *Rogers II* because: (a) his motion for fees was not timely filed within 40 days of the issuance of the remittitur (Cal. Rules of Court, rules 870.2(c)(1), 27(d)(1)); and (b) paragraph 14 of the Settlement Agreement states that upon SPCA's material breach, "the Purchase Agreement and Escrow shall be automatically canceled and terminated without liability on the part of one party to the other."

Similarly, with regard to trial court fees, SPCA contended Rogers had waived his right to any fees under paragraph 14 of the Purchase Agreement.

In reply, Rogers reiterated that he was entitled to fees as the prevailing party to the entire action, and not just as the prevailing party in *Rogers II:* "In connection with the instant motion for attorneys' fees, Rogers seeks his fees as the prevailing party to the entire action. With the trial court's decision having been reversed and the underlying judgment involuntarily dismissed, may it not be said that Rogers is the prevailing party as to the action? Notwithstanding this rhetorical question, it must be noted and clearly understood by the reader that Rogers is seeking attorneys' fees in his belated capacity as prevailing party to the entire action, not just as prevailing party to the second appeal. It is the Court of Appeal's decision arising out of the second appeal that promotes Rogers to the prevailing party status as to the entire action. It is unclear how LASPCA may otherwise interpret this Court's involuntary dismissal of the entire action as not vesting in Rogers the title of prevailing party. LASPCA lost the appeal, but more importantly, lost the judgment and the action with the court's dismissal with prejudice. Rogers certainly may now claim his right as prevailing party, with reimbursement of his attorneys' fees as just award."

Rogers further contended that his motion for fees was timely filed within 60 days of service of the notice of entry of judgment (dismissal with prejudice) on April 18, 2003. (Cal. Rules of Court, rule 870.2(b)(1).) Rogers argued that because the "involuntary dismissal of the entire action with prejudice was, in fact, a rendition of judgment in the trial court in favor of Rogers[,]" the filing deadlines of rule 870.2(b)(1), rather than of rule 870.2(c)(1), should apply.

With regard to Paragraph 14 of the Settlement Agreement, Rogers asserted that SPCA, having allegedly violated Paragraph 14 by opposing the cancellation and termination of the Purchase Agreement and escrow, was not entitled to claim the benefits of that paragraph. Rogers contended that Paragraph 14 required SPCA not to oppose Rogers' motion to vacate the summary judgment, given that Rogers was not in breach of the Settlement Agreement. Rogers stated: "Paragraph 14 further expressly contemplates that the underlying Purchase Agreement and Escrow ***shall be automatically canceled and terminated*** with no liability on the part of one party to the other. LASPCA ignores the fact that because LASPCA refused to cancel the Purchase Contract and Escrow upon its breach, that the second part of the sentence is of no import. By its twisted argument, LASPCA believes it was free to not perform under the cited sentence of paragraph 14 by steadfastly refusing to cancel the Purchase Agreement and Escrow, but notwithstanding said breach, LASPCA believes it is somehow entitled to enjoy the remaining benefits of the cited sentence; *i.e.,* no liability owed to Rogers. LASPCA says it is free to breach those specific 'negative' provisions of paragraph 14, yet it wants to enforce all of the 'positive' provisions so long that the provisions benefit LASPCA and deter Rogers' claim for attorneys' fees." "Accordingly, LASPCA does owe liability to Rogers for having materially breached the settlement agreement by, *inter alia*, failing and refusing, and continuing to fail and refuse, to cancel the Purchase Contract and Escrow, which is still open."

Finally, Rogers contended that, because paragraph 6 of the Settlement Agreement entitled SPCA to receive $20,000 in fees upon the successful close of escrow, Rogers

should be entitled to fees as the prevailing party under Civil Code section 1717's mutuality provisions.

At oral argument below, Rogers' attorney pointed out that escrow was still open and the funds had not been released, "and we just have a practical problem how do we get our money out of escrow now if we don't get an agreement from counsel."

The trial court denied the motion for attorney fees and this appeal followed.

DISCUSSION

The parties agree that the issues before us present questions of law for which the independent or de novo review standard properly applies. (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 705.)

Plaintiff contends he is entitled to attorney fees under the attorney fee clause contained in the Purchase Agreement. Plaintiff's theory, as we understand it, is as follows: (1) under Paragraph 14 of the Settlement Agreement, SPCA's failure to deposit the funds on time constituted a material breach of both the Settlement Agreement and the Purchase Agreement; (2) under Paragraph 14 of the Settlement Agreement, SPCA's material breach entitled Rogers to move to vacate the summary judgment and dismiss the action with prejudice, without opposition by SPCA (provided Rogers was not in breach of the Settlement Agreement); (3) due to SPCA's material breach, SPCA was no longer entitled to the benefit of Paragraph 24, which provided that the parties would bear their own attorney fees upon the successful close of escrow; (4) "upon LASPCA's breach of the settlement agreement, the Purchase Agreement was automatically canceled, thereby requiring LASPCA to pay Rogers' attorneys' fees under Paragraph 16 of the Purchase Contract"; (5) the language in Paragraph 14, that upon SPCA's material breach "the Purchase Agreement and Escrow shall be automatically canceled and terminated without liability on the part of one party to the other," does not "release the continuing obligation to pay attorneys' fees incurred to obtain cancellation of the Purchase Agreement and escrow, which remains open to date"; and (6) because Paragraph 9 of the Settlement

Agreement awards attorney fees to SPCA in the event of a breach by Rogers, under the mutuality provisions of Civil Code section 1717, Rogers may recover attorney fees due to the material breach by SPCA.

As we discuss below, we disagree with Rogers' legal interpretation of the Settlement Agreement as it pertains to attorney fees. In our view, the Settlement Agreement was intended to compensate Rogers for the dismissal of his appeal in *Rogers I* either by cutting SPCA's fee award in half (from $40,000 to $20,000) upon the successful close of escrow, or by eliminating SPCA's fee award altogether upon SPCA's material breach of the Settlement Agreement. We do not believe the Settlement Agreement gave Rogers the right to seek fees from SPCA under any legal theory. On the contrary, we conclude that the Settlement Agreement expressly precludes Rogers from seeking fees from SPCA.

I
The Parties Agreed to Bear Their Own Fees, Except as Rogers May be Required to Pay SPCA's Fees Under Paragraphs 6 and 9 of the Settlement Agreement

In paragraph 24 of the Settlement Agreement, the parties agreed that "[e]xcept for the payment of attorneys' fees by Rogers as may be required by paragraphs 6 and 9, if applicable, each party shall bear its own attorneys' fees and costs in connection with the Complaint, the Cross-Complaint, the Purchase Agreement, the Judgment, the Appeal, and this Settlement Agreement." This paragraph, when read in conjunction with paragraphs 6 and 9, clearly expresses the parties' intention to preclude Rogers from seeking attorney fees from SPCA in the event of a breach by SPCA.

Paragraph 6 explains the potential benefit to be reaped by Rogers for dismissing the *Rogers I* appeal. Specifically, the Agreement entitled Rogers to pay only half of SPCA's $40,000 attorney fee award, upon successful completion of the sale. Under paragraph 6 of the Settlement Agreement, $20,000 was to be withheld from the net sales proceeds due to Rogers upon the close of escrow. The $20,000 was to be paid to SPCA

as "full satisfaction of the $40,000 in attorneys' fees and $747.10 awarded to LASPCA under the Judgment."

Paragraph 9 explains that the benefit bestowed by paragraph 6 to Rogers is only available if he fully performs under the Agreement. While Paragraph 9 prohibits SPCA from enforcing the summary judgment and attorney fee award against Rogers if he fully performs his obligations, his failure to perform would allow SPCA "to enforce the Judgment, including, without limitation the award of attorneys' fees and costs, by utilizing the continuing jurisdiction of the Court as provided in paragraph 9 of said Judgment or as otherwise may be required to enforce said Judgment. In addition, the parties agree that if Rogers is in default of this Settlement Agreement, then in addition to all other remedies available to LASPCA hereunder, LASPCA will be entitled to all of its attorney's fees and costs subsequent to the date of the Judgment; i.e., June 21, 2000."

The glaring omission in the Settlement Agreement's discussion of attorney fees is the lack of any reference to Rogers' right to seek fees from SPCA. Instead, Paragraph 24 expressly states that "[e]xcept for the payment of attorneys' fees by Rogers as may be required by paragraphs 6 and 9, if applicable, each party shall bear its own attorneys' fees and costs in connection with the Complaint, the Cross-Complaint, the Purchase Agreement, the Judgment, the Appeal, and this Settlement Agreement."

The obvious meaning of Paragraph 24, as influenced by Paragraphs 6 and 9, is that Rogers must bear his own fees.

II
The Settlement Agreement Does Not Contemplate SPCA's Payment of Rogers' Fees In the Event of a Breach by SPCA

Our conclusion above, that Rogers must bear his own fees, is consistent with Paragraph 14 of the Settlement Agreement. Paragraph 14 provides that SPCA's failure to deposit the $273,000 in accordance with the Settlement Agreement shall constitute a material breach of both the Settlement Agreement and the Purchase Agreement, and "the

Purchase Agreement and Escrow shall be automatically canceled and terminated without liability on the part of one party to the other."

Paragraph 14, when read in conjunction with Paragraph 24, reinforces our determination that the parties intended to hold Rogers responsible for his own fees, even in the event of a breach by SPCA. While Rogers' position that the Purchase Agreement's attorney fee clause survives the termination of that agreement is reasonable when viewed in a vacuum, it fails when viewed in conjunction with Paragraphs 24 and 14 of the Settlement Agreement. The only plausible meaning of the documents before us is that Rogers must be made to bear his own fees, notwithstanding any material breach by SPCA. While Rogers argues that paragraph 24 "would only take effect upon both LASPCA and Rogers performing their respective obligations under the settlement agreement to close escrow," the plain meaning of the language used in paragraph 24 proves otherwise.[3]

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3 Paragraph 14 of the Settlement Agreement permitted Rogers, upon a material breach by SPCA, to move to vacate the summary judgment and dismiss the action with prejudice. Paragraph 14 also stated, "In the event that Rogers is not in default of this Settlement Agreement, then LASPCA shall not oppose said motion."

SPCA opposed Rogers' motion, contending that Rogers *was* in default of the Settlement Agreement. In his motion for attorney fees, Rogers contended he was not in default because he had been vindicated by the *Rogers II* appeal. Rogers asserted that SPCA's filing of opposition to his motion was a material breach of Paragraph 14 the Settlement Agreement. Rogers claims that SPCA's material breach eliminated SPCA's right to claim the benefit of Paragraph 24, whereby each party would bear its own attorney fees.

The notion that SPCA waived its right to file opposition to Rogers' motion based on Rogers' alleged default is unsupported by the Settlement Agreement's terms. While Paragraph 14 expressly states that SPCA's failure to deposit the money into escrow as required by the agreement would constitute a material breach, the agreement does not state that SPCA's filing of opposition to Roger's motion, based on Rogers' alleged default, would constitute a material breach.

The proper construction of a contract "'"does not mean that words are to be distorted out of their natural meaning, or that, by implication, something can be read into the contract that it will not reasonably bear; but it means that the contract shall be fairly construed with a view to effect the object for which it was given and to accomplish the purpose for which it was designed."' [Citations.]" (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 39.)

To equate the words, "In the event that Rogers is not in default of this Settlement Agreement, then LASPCA shall not oppose said motion," with a knowing waiver of SPCA's right to challenge

III

Civil Code Section 1717 Does Not Apply

Rogers claims that because the Settlement Agreement allows SPCA to seek attorney fees from him upon his breach of the agreement, he should be allowed, under the reciprocal rights granted by Civil Code section 1717, to seek attorney fees from SPCA.

SPCA responds that Civil Code section 1717 does not "apply to cases such as these that have been reduced to judgment and fully, competently and professionally negotiated to settlement in the interest of judicial efficiency. The result of such a construction likely would be a substantially less successful voluntary mediation program." SPCA also points out that section 1717, subdivision (a) expressly does not apply, where, as here, "each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." (Civ. Code, § 1717, subd. (a).) In addition, SPCA contends that the attorney fee provisions in the Settlement Agreement are not of the sort described in section 1717, subdivision (a). Section 1717, subdivision (a) states that it applies "where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party . . . ." SPCA maintains section 1717, subdivision (a) does not apply to the "fully negotiated terms of the Settlement Agreement[which] narrowly tailored and limited [the right to

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Roberts' alleged default would be to distort the agreement beyond reason. Waivers are not to be so easily implied with no supporting evidence. "A definition of 'waiver' is set forth in *Roesch v. De Mota* (1944) 24 Cal.2d 563, 572, 150 P.2d 422: 'Waiver is the intentional relinquishment of a known right after knowledge of the facts.' *Crest Catering Co. v. Superior Court* (1965) 62 Cal.2d 274 holds at page 278, 42 Cal.Rptr. 110, 398 P.2d 150: 'A waiver may occur (1) by an intentional relinquishment or (2) as "the result of an act which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished."'" (*Freshman, Mulvaney, Marantz, Comsky, Kahan, & Deutsch v. Superior Court* (1985) 173 Cal.App.3d 223, 233-234.)

We believe the natural meaning of Paragraph 14, when fairly construed in the context of the parties' entire agreement, to be: "In the event that Rogers is not [alleged to be] in default of this Settlement Agreement, then LASPCA shall not oppose said motion." We therefore reject Rogers' unsupported contention that SPCA's mere act of opposing his motion (on the basis of his alleged breach of the agreement) constituted a material breach of the Settlement Agreement. We similarly reject Rogers' contention that SPCA may not claim the benefit of Paragraph 24's provision that each party shall bear its own fees.

attorney fees] to a specifically identified set of circumstances . . . to wit, Rogers' default of two provisions of the Settlement Agreement (paragraphs 6 and 9 thereof) . . . ."

The purpose of section 1717 was "'to establish mutuality of remedy where [a] contractual provision makes recovery of attorney's fees available for only one party [citations], and to prevent oppressive use of one-sided attorney's fees provisions. [Citation.]' (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 . . . .)" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870.)

We agree with SPCA that the purpose of section 1717 would not be furthered by applying its provisions to this Settlement Agreement, which was narrowly drafted to provide Rogers with some incentive (a $20,000 reduction in his liability for attorney fees) for dismissing *Rogers I,* but without exposing SPCA to the added risk of having to pay Rogers' attorney fees. There is no indication or contention that negotiation of the Settlement Agreement was oppressive or one-sided. In addition, both parties were represented by counsel in negotiating the Settlement Agreement, which is a fact expressly noted therein. For all these reasons, we conclude Rogers is not entitled to attorney fees under section 1717.

IV
Timeliness

Rogers contends the trial court erroneously found that his motion for attorney fees was not timely filed. Given our legal conclusion that Rogers is not entitled to fees, we need not address this issue.

DISPOSITION

We affirm the order denying Rogers' request for attorney fees. The parties are to bear their own costs.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

MALLANO, J.